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NO. 71-705

IN THE

Supreme Court of the United States

October Term, 1971

GALVESTON CITY COMPANY, ET AL, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION OF GALVESTON CITY COMPANY, ET AL, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners (Galveston City Company, First Hutchings-Sealy National Bank as Liquidating Trustee for Galveston City Company and Its Stockholders, Hutchings-Sealy National Bank as Liquidating Trustee for Galveston City Company and Its Stockholders, and Hill's Fish & Oyster Company, a Partnership composed of Frank M. Hill, Smith M. Hill, and C. R. Hill) pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 6, 1971 (Appendix A) affirming judgment of the District Court of the United States for the Southern District of Texas

in favor of Respondent with the order overruling Petitioners' motion for rehearing being entered on September 16, 1971 (Appendix A).

OPINIONS BELOW

The District Court's memorandum opinion is dated January 23, 1970, and consists of 225 pages (R. 1586-1811). Due to its length, Petitioners, simultaneously with filing this petition, have filed separately forty copies of it as Appendix B. The District Court's opinion is not reported. The opinion of the Court of Appeals is carried in Appendix "A" hereto and is reported as *United States v. 1,078.27 Acres of Land, Galveston Co., Tex.*, 446 F.2d 1030.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1971. Petition for rehearing was filed and was overruled on September 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

(1) Whether the conduct of the Trial below was such as to fatally infect its judgment.

(2) Whether the Courts below refused to follow the decisions of the Texas Supreme Court in *Waco Bridge Company v. City of Waco*, 85 Tex. 320, 20 S.W. 137 (1892) and subsequent cases on a question of local land to the effect that when the government accepted the 1898 deed with the reverter clause in it, it could not thereafter contend that its grantor did not have title at the time of acceptance of such deed.

(3) Whether the Courts below erred in not following *State v. Jadwin,* 85 S.W. 490 (Tex. Civ. App., 1904, err. den.—err. dismissed, 209 U.S. 553), which limited the exception in the Menard Grant to fifteen (15) acres.

ADDITIONAL QUESTIONS TO BE URGED IF PETITION IS GRANTED

The three questions above-noted are basic questions presented as the reasons for granting the writ, but, in the event a writ is granted, due to the length of the Trial Court's memorandum and the many theories discussed by it and the obvious impracticability of presenting each of them as a grounds for a grant of this petition, additional questions will be presented. Petitioners list in the footnote below these additional questions which will be presented and urged upon granting of this petition:[1]

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1. (1) Both Courts below erred in holding that the reverter clause in the deed from City Company to the United States was not valid and binding upon the United States.

(2) The Trial Court erred in holding that the burden of proof was not on the United States.

(3) Both Courts below erred in holding that the fifteen (15) acre exception in the Act of December 9, 1836 was not void for uncertainty.

(4) Alternately, both Courts below erred in holding that the exception covered more than 4.9 acres.

(5) Both Courts below erred in holding that there was a fort or fortification within the meaning of the treaty of annexation in 1845 and the Government acquired title thereby.

(6) The Trial Court erred in holding that the judgment in *Galveston City Company v. Gresham* precluded City Company.

(7) The Trial Court erred in holding that the pleadings in the case of *State v. Galveston City Company* (1873) estopped City Company from claiming title.

(8) The Trial Court erred in holding that City Company's claim was barred by the Texas ten-year land statute of limitations.

(9) The Trial Court erred in not holding that the conditions subsequent in the 1898 deed had been broken and that full title was in the City Company.

STATEMENT

All Petitioners claim by and through Galveston City Company, collectively referred to here as "City Company". Prior to November 21, 1959, a controversy existed as to the title to 1,078.27 acres of land situated on the East End of Galveston Island.[2] On November 21, *1959* the United States brought suit to remove cloud and, in the alternative, to condemn whatever interest City Company might have (R. 13). On motion, the Government's bill to remove cloud portion of the case was severed from the condemnation alternative (R. 27) and tried first. After usual discovery procedures, trial commenced on *February 18, 1963*, and continued for some five days, with the evidence being closed on February 23, 1963, and the case submitted on briefs. On trial, the major Government contention was that in 1845 (the date of annexation between Texas and the United States), there was a fort on the East End of Galveston Island and that, because of this, the Government had title. Shortly before May 18, 1964, the Court requested all counsel to be present, and, on that date, May 18, 1964, the Trial Court stated that the record was not as full as he would like to have had it (R. 1311), that since the trial "it has been my purpose to find out whether there was evidence of which a Court could take judicial knowledge, showing without any peradventure of doubt that the predecessor in title to the United States government, that is the Republic of Texas, took possession of this reserve land at the East End of Galveston Island and had been reasonably in continuous possession of that land since 1836" (R.

2. The land in controversy is shown as Tracts 3, 4 and 6 on Exhibit 1 of this petition, with the two small tracts marked "A" and "B" being omitted from the suit by the Government.

1312). After making this statement, the Court then re-opened the case, stating that it was his feeling that, if the Republic of Texas actually retained possession, there was bound to be some record of it. The Court further stated, "Without stating in detail just how we finally came upon the evidence * * * I now think it was absolutely without any basis of doubt that the Republic of Texas retained possession of the East End * * *" (R. 1313), and after so stating, the Court further said, "My search has led me to an obscure, but, in my opinion, the very best history of the City of Galveston. It is entitled 'A History of the City of Galveston to 1965'" by Jessie Owen Webb (R. 1314).

Further quoting the Court, "It was a master's thesis written by the gentleman in June of 1924. It says 'This thesis I presented to the faculty of the graduate department of the University of Texas for the degree of Master of Arts by Jessie Owen Webb, Austin, Texas, June 1924'" (R. 1314). The Court then proceeded to read three pages of this essay into the record (R. 1315). City Company objected to the re-opening of the record on the Court's own motion, to the inclusion in the record of any evidence of the type of this essay because we did not have the right of cross-examination, there was no proof of authenticity, and the "evidence" was not introduced by either party, and further objected on the basis that as to the statement by the Court that there were other papers that would sustain his position, we were completely without knowledge and without ability to know what he was talking about (R. 1318). We again objected to the introduction of additional evidence, the inclusion of the statements of the Court as evidence, the consideration of Webb's essay, and consideration of any papers of which we had no knowl-

edge (R. 1318-1319). The Court then made this statement:

> "THE COURT: Well, with no criticism of the Government, but if the Government had correctly proceeded with the case and properly prepared it, it would not have been necessary for this research to be done." (R. 1320)

The Court then left the record open for whatever evidence either party cared to present, and City Company replied that it felt so strongly that the Court was in error in taking judicial knowledge of something that was not properly part of the record that it did not propose to go forward (R. 1322). The Court directed counsel to return on June 1, 1964 (R. 1323).

On June 1, 1964, the Government did not attempt to introduce the Webb essay but did over our objection introduce the so-called Morgan papers (R. 1868).[3] The Court of Appeals held that the Webb essay was inadmissible as hearsay, and, as shown by the footnote, the Morgan papers do not support any finding.

After June 1, *1964*, and apparently up until the time of the memorandum opinion of January 23, *1970*, as shown

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3. These papers show only the existence of a small detachment of troops on Galveston Island (location not shown) in 1836 (Govt. Ex. 36 to 38) and a committee of citizens with small Republic financial support in 1842 and to March 1943 (Govt. Ex. 39 to 41), but do not disclose the location or existence of any fort in 1845, but, on the contrary, show that no fort existed—page 9 of Govt. Ex. 39 affirmatively stated, "The platform thrown up during the excitement of last fall (1842) near the old fort will be of no use in the defense of the island. Some of the timbers used in its construction was in a decayed state when built and would not for any length of time answer the purpose of an efficient battery and much of that left is entirely useless from its rotten state."

by the memorandum opinions on their face, the Trial Court investigated and considered many sources outside the record. For example, the Court states in his opinion, "Where the record has been found unsatisfactory as to pertinent events and facts of this kind, they have been researched" (p. 7, Appendix B—R. 1593). The Court's opinion further shows that the research has been conducted in practically every conceivable place in Texas. (P. 7, Appendix B.—R 1593).[4]

Additionally, the Court secured what is apparently copies of transcripts of three prior cases and used these as the partial basis for his opinion and filed these copies with the Clerk. However, neither side introduced these transcripts.[5]

The Court of Appeals, without knowing what the Trial Court considered outside the record and without the

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4. The Trial Court said: "It is manifest from even a brief statement of the background of this case that many of the issues turn on political, military, historical and natural events and facts which would have been of general public knowledge at the time of their occurrence. Where the record has been found unsatisfactory as to pertinent events and facts of this kind, they have been researched. Such research was conducted at the Rosenberg Library, Galveston, Texas; the Houston Public Library; the Archives Division of the Texas State Library; files of the Galveston Daily News and Galveston Tribune; Federal Records Center, Barker Texas History Library, University of Texas Library; and the Anthropology Library of the Texas Archeological Research Center of the Department of Anthropology of the University of Texas. When appropriate, the results of such research has been judicially noticed."

5. In fact, both sides, in substance, declined to do so. On the first day of the trial, the Court asked about two of these three:

"The Court: Does either party have the transcript from the Supreme Court of the two Supreme Court cases involving the Menard Patent?

Mr. West: No, your Honor.

Mr. Shirley: No, Sir." (R. 623)

record showing what was so considered, held that it would presume that the Trial Court considered only such things as he could properly take judicial notice of and properly separated the wheat from the chaff—again, without knowing or having any way of knowing what was the wheat and what was the chaff.

With this background, we move into the evidence introduced on Trial.

On July 30, 1834, the State of Coahuila and Texas granted the entire East End of Galveston Island (including the land in controversy here) to Menard as assignee of Seguin (Def. Ex. 9), and prior thereto there had been the concession to Seguin of January 17, 1833 (Def. Ex. 9). This concession and the grant were supported by the Moreland field notes (Def. Ex. 9—see Def. Ex. 10 placing these field notes on the ground). Thereafter, Borden surveyed the East End for Seguin, and his field notes dated July 22, 1835 are shown as Def. Exs. 11 and 12. Because of the controversy with respect to Mexican titles, Menard as assignee of Seguin, after the independence of Texas, petitioned the Congress of Texas to confirm the grant (Def. Ex. 15). The Congress of Texas by the Act of December 9, 1836 (Gov't. Ex. 1) authorized the granting of the entire East End of Galveston Island to Menard with an exception reading as follows:

> "All that tract of land from the extreme east end of the Island of Galveston running west on the north side of the Island until it strikes a bayou a short distance above the present fort, thence up said Bayou to its source, thence in a straight line across the Island to the Gulf, containing fifteen acres more or less." (Gov't. Ex. 1).

On December 9, 1836, there was no known plat of the East End of Galveston Island (R. 1064). In 1837, we find the Trimble & Lindsey Survey of the area on Galveston Island west of the City of Galveston, but not including the area covered by the Act of December 9, 1836 (Gov't. Ex. 3). Numerous references are made to this plat, and we attach it as Exhibit 2 to this petition. There is no evidence that Trimble & Lindsey surveyed the area called for in the Menard Patent (R. 1073-74). Next is the Patent from the State of Texas to Menard dated January 28, 1838 covering the entire East End of Galveston Island and the submerged lands to the extent of 150 varas from the uplands, which would include all of the land in controversy here subject only to the following language in the Patent, "except the reservations expressed in the fifth section of the Act of Congress aforesaid" (the fifth section being that portion of the Act above-quoted) (Gov't. Ex. 2). After the Patent of January 28, 1838, next in order of time is the Groesbeck Map of 1838 (Gov't. Ex. 4). Again because of the numerous references to this map, we attach it as Exhibit 3 to this petition. Menard's title admittedly immediately vested in City Company and to show the variations in the shore line of the east end of Galveston Island relating to the property in controversy, we attach Exhibit 4 showing the shore lines in 1838, 1850 and 1875.

Next is the treaty of annexation between the United States and Texas dated June 23, 1845 (Gov't. Ex. 7), which provides that Texas should cede to the United States its military installations. On July 17, 1888, City Company gave a jetty right of way deed to the United States which substantially goes into the area in controversy (with this right of way deed also containing a reverter clause similar

to the one hereafter discussed with respect to the entire tract) (Def. Ex. 26). On June 8, 1889, the local United States Engineer in Galveston (Major Ernst) wrote to the Chief of Engineers stating that the United States Attorney had suggested that the United States might own some land on the east end (Def. Ex. 28). On August 13, 1889, Major Ernst again wrote the Chief of Engineers saying, "The United States has never heretofore, so far as I know, made any claim to the ownership of any portion of it, except the small tracts recently acquired for the purpose of a life saving station and building a jetty" (Gov't. Ex. 12). Incidentally, the area of the life saving station was by patent from the State (Gov't. Ex. 6), and the land for building the jetty was by deed from City Company (Def. Ex. 26). This same report also stated, "Only a small portion of this ground is now occupied." This report gives a good factual background. On September 12, 1894, the Attorney General wrote to the Secretary of War with references to the land in controversy, stating it was "supposed to belong to the United States". He further stated "but the accompanying papers contain no information as to the existence of the fortification or even of the reservation at the date of the admission of Texas into the Union (December 29, 1845). For aught that appears, the land may have, previously to that time, been abandoned as a military reservation and otherwise disposed of by the Republic of Texas" (Def. Ex. 29). This same theme is carried forward in the letter from the Chief of Engineers to the Secretary of War dated December 5, 1894, wherein the Chief of Engineers said, "There is nothing in the papers to show that the fortification existed at the time of the admission of Texas * * *" (Def. Ex. 30). Thereafter, the Chief of Engineers recommended that his people

be authorized to fence the land and take possession of it. This recommendation was approved, and on January 12, 1895, the Chief of Engineers ordered the District Engineer to fence it (Gov't. Ex. 13). Nothing further happened until 1898, at which time the United States requested the deed from City Company to the land in controversy (Def. Ex. 32). On March 12, 1898, the Board of Directors of City Company, pursuant to this request, authorized the execution of a deed to the land in controversy to the United States with the reverter clause in it (Gov't. Ex. 21). On March 17, 1898, the City Company deeded the land in controversy here to the United States, and, carrying out the limitations contained in the Board of Directors resolution, this deed had the following reverter clause:

> "BUT IT IS EXPRESSLY UNDERSTOOD AND AGREED, however, that the above described property is hereby conveyed to the United States of America upon the following conditions, that is to say, that the said property is to be used by the United States of America for fortifications, military or naval posts, and other public purposes of the U. S. Government, only, and if at any time it be abandoned to the purposes aforesaid, or the said property is used for any private purposes whatsoever, then in such, or any or either event, the title to said property hereby conveyed shall immediately revert to and vest in the said Galveston City Company, its successors or assigns." (Gov't. Ex. 20)

This deed was delivered to Lieutenant Riche who in turn forwarded it to the Chief of Engineers on March 26, 1898 (R. 1130). The odyssey of the 1898 deed then began—all caused by the reverter clause. For a resume of how this deed went back and forth, we call the Court's attention to the Government's answer to one of our in-

terrogatories which is quoted on pages 1129-1134 of the Record, and which is also shown by our Exhibits 81 to 91. The reverter clause received consideration at every stage—by the Chief of Engineers at least 7 times, by the Secretary of War at least 7 times, and by the Attorney General of the United States at least 8 times. This took place from the date of transmittal to the Chief of Engineers on March 26, 1898 to July 26, 1910, at which time the Attorney General recommended the acceptance of the deed (Def. Ex. 91), and based upon this advice, the Chief of Engineers recommended acceptance of the deed to the Secretary of War on August 1, 1910, who on August 3, 1910 approved the recommendation, and the Chief of Engineers sent it back to Galveston with the directions that it be recorded which was done on August 10, 1910 (Def. Ex. 121) (Gov't. Ex. 20 showing the recording date.)[6]

Therefore, the effective date of the deed was August 3, 1910. Prior to the institution of this suit, no notice was brought home to City Company or its representatives that the Government resisted or objected to the reverter clause or made known any intention not to abide by it (R. 1122 and 1124).[7]

Between the date of the deed in 1898 and its acceptance in 1910, the case of *State v. Jadwin* had been tried, and

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6. The United States introduced the deed from City Company to the United States for all purposes (R. 706), and under Texas practice this alone would bind the Government to the deed and all provisions in it.

7. After the abandonment of the fort in 1947, there was one lawsuit and considerable correspondence between City Company and the United States, but as hereafter shown there was never any declaration by the United States disclaiming under the deed or advising that it would not be bound by it.

the Texas Courts had held that the Government title at the most was limited to 15 acres and no more with no accretion and no additions (Gov't. Ex. 6—Jadwin record including the Texas Court of Civil Appeals opinion). The case is also reported in 85 S.W. 490 (1904). The Texas Supreme Court denied a writ of error. This Court granted certiorari but the case was then dismissed on motion of the Solicitor General—209 U.S. 553 (1908). The *Jadwin* opinion by the Court of Civil Appeals was rendered on December 1, 1904, and the Texas Courts definitely limited the 15 acre exception in the Act of 1836 at the most to 15 acres and no more, and specifically held that the 15 acres could not be increased by accretion.

The *Jadwin* decision excited renewed interest in the 1898 deed because since the Texas Court's decision limited the exception to 15 acres, the City Company's 1898 deed had the effect of conveying the remainder of the acreage to the United States.

One of the principal reasons for the Government's final acceptance of the 1898 deed was since the *Jadwin* decision had limited the Government to 15 acres (purportedly arising out of the 15 acre exception in the Act of 1836) and since City Company admittedly had been granted title to anything not covered by the exception, the effect of receiving the deed from the City Company would be to enormously enlarge the area claimed by the Government from 15 acres (at the most) to more than the then 658 acres (now 1078.2 acres). This reasoning and undoubted benefit to the Government is shown by the opinion of Assistant Attorney General Sanford who, when considering the question of acceptance of the deed, stated, "It would appear, as some of the accretions in the disputed

tract may perhaps have enured to the Menard title, that this quit claim deed from them might in certain contingencies be very advantageous to the Government" (Def. Ex, 115). This same theme was carried out by Attorney General Bonaparte who wrote, "From the information that I now have, it would appear that as some of the accretions in the disputed tract may have perhaps enured to the Menard title, this quit claim deed in certain contingencies would be very advantageous to the Government and unless there is some objection of which I am not now advised, it would appear probable that this deed should be accepted and recorded at as early a date as possible" (Def. Ex-116). We, therefore, take it to be clear that one of the benefits to the United States in acceptance of the deed with the reverter clause was to get title to the entire tract over and above the 15 acre limitation as set by the *Jadwin* decision.

Additionally, other benefits were secured by the United States. Lieutenant Riche wanted the deed recorded in order to commence the running of the Texas five year statute of limitation in favor of the Government against other persons (Def. Ex. 82). Another benefit is shown by the letter from the United States Attorney to the Attorney General wherein he stated, "This limitation upon the uses of the land may be objectionable if the United States contemplates using any part thereof for purposes other than those mentioned in said limitation. Otherwise, I'm inclined to believe that this deed from the Galveston City Company would be helpful to the Government in the suit of Fannie I. Cochran against it" (Def. Ex. 117).

Still another benefit to the Government is shown by the District Attorney McDaniel's letter to the Corps of Engi-

neers dated August 23, 1910 where he stated, "The acceptance and registration of said deed would in a measure tend to strengthen the claim of the Government to all the lands on the East End claimed and desired", and further stated that "It would be to get the claim of the City Company out of the way" (Def. Ex. 122).

In summary, the benefits to the Government, as expressed by the Government's own attorneys accepting the 1898 deed with the reverter are as follows:

> (1) To secure title (subject to the reverter) to the entire East End and remove the 15 acre limitation set by the *Jadwin* case.
>
> (2) To strengthen the Government's claim of limitations under the five year statute against all parties.
>
> (3) To benefit the Government in the Cochran suit.
>
> (4) To settle and remove the claim of City Company.

However, one additional benefit later occurred. After acceptance of the 1898 deed in 1910, the Government desired further assurance of title and sought and secured a patent from the State to the entire area (then 658 acres plus accretions), which patent is dated June 28, 1912 (Gov't. Ex. 26) pursuant to Senate Bill 121, March 16, 1911 (Gov't. Ex. 25). The request for the patent from the State is shown by the letter from Major Howell to J. D. Boman, Private Secretary of the Governor, dated October 3, 1910, in which the United States represented to the Governor that they had Menard's title, saying, "With reference to the third claim, that by the Galveston City Company, on March 17, 1898, they deeded to the United States Government all the land in question under the

proviso that it be used for purposes of the Government" (Def. Ex. 41). However, the Texas Act of 1911 authorizing the 1912 Patent does not help the Government as against us because it provides that the grant "Shall not be construed to in any manner affect the title or claim of persons holding under the grant to Juan Seguin or the patent issued to M. B. Menard or the patents issued to W. A. A. Wallace for lands covered by the provisions of this Act" (Gov't Ex. 25).

After 1898 the Government used the land as a military fort until the latter part of 1947 at which time it ceased to be used as a fort (R. 1108, 1109, 1115, 1168, 1169), and on January 19, 1959, the land was officially transferred to "civil account" from "military account" (Def. Ex. 112). From 1947 until the date of filing of this suit by the Government on November 21, 1959, we asserted our title, brought on suit in the State Courts and presented on numerous occasions our claim to the Government (Gov't. Ex. 29 and Def. Exs. 58 to 78). At no time prior to the time of filing suit, or as a matter of fact prior to the Government's answers to our interrogatories, did the Government assert that it would not be bound by the reverter clause. With this background, we now discuss the specific questions presented.

REASONS FOR GRANTING THE WRIT:

I.

CONDUCT OF THE TRIAL BELOW

The Court of Appeals stated that our complaint is based upon the Trial Court's re-opening the case in June of 1964 and bringing to our attention his independent research which he had conducted in the meantime. This is

not the basic thrust of our complaint. The record shows that some fifteen months after submission and on May 16, 1964, the Court stated, "My search has led me to an obscure but, in my opinion, the very best history of the City of Galveston" (R. 1314). The Court of Appeals has held this history (Webb essay) inadmissible as heresay. On June 1, 1964, at another hearing, the Government did not introduce the Webb essay, but did introduce some of the Morgan papers, which, as previously shown in our statement (footnote (3)), do not prove anything. These are the only specific matters discussed by the Court of Appeals. However, after June 1, 1964, and up to January 26, 1970, using the Trial Court's own words, "Where the record has been found unsatisfactory as to pertinent events and facts of this kind, they have been researched" (R. 1593), and, as noted by the Court of Appeals in Footnote 4 to its opinion, went apparently to every conceivable place in the State of Texas looking for other information, and the Trial Court, after so doing, said, "When appropriate, the results of such research have been judicially noticed". For in excess of five years after the June 1, 1964 hearing, the Trial Court engaged in extensive research on its own. We do not know; the Court of Appeals does not know, and the Government does not know the nature of this investigation and purported evidence—what it is, its origin, or its admissibility. We do know that the Webb essay (held inadmissible by the Court of Appeals) was thought by the Trial Court to be the best history of Galveston and that the Trial Court took judicial notice of unknown material.[8]

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8. We do know that in litigation covering this same land in the *Jadwin* case (85 S.W. 490 [1904]), three distinguished Texas Judges headquartered and sitting in Galveston, Texas, said, "But aside from

The authorities cited by the Court of Appeals are not in point here. In those cases, the record on appeal disclosed both the inadmissible and admissible evidence, and the Court could make an intelligent determination of the possible effect upon the findings below. This is not so here because there is no way of knowing what information, what purported evidence, or what documents were relied upon by the Trial Court. Suppose, for example, that there was no evidence in the record to show whether a fort existed on the East End of Galveston Island in 1845 and where it was located (which we believe to be the record here), and this Court was faced with an opinion by the Trial Court in which he stated that over a period of five years he had researched the facts and found that a fort did exist and then stated that when appropriate the results of such research had been judicially noticed. This Court would have to either render against the finding or, at least, reverse. If this appraisal be sound, then (assum-

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this, it is enough, and decisive of this appeal to hold that the land in question is not, and never was, a part of the site of the fort and its appurtenances". The Texas Court of Civil Appeals so holding was composed of Chief Justice C. C. Garrett—first appointed as presiding Judge of Section B of the Commission of Appeals to the Texas Supreme Court and, upon creation of the Galveston Court of Civil Appeals on September 1, 1892, was First Chief Justice of that Court of Civil Appeals (20 S.W.), Associate Justice R. A. Pleasants, who had been on the Court from November 21, 1899 (50 S.W.), and Associate Justice W. H. Gill, who also went on the Court in 1899 (50 S.W.). The Texas Supreme Court denied a writ of error and was composed of Chief Justice Reuben R. Gaines, who went on that Court in 1886 and who regularly sat at Galveston, Austin, and Tyler (56 Texas), Associate Justice Thomas A. Brown, who went on that Court in 1893 (86 Tex.), and Associate Justice F. A. Williams, who was on the first Galveston Court of Civil Appeals created on September 1, 1892 (20 S.W.) and who, in 1898, resigned from that Court in order to accept an appointment as Associate Justice of the Supreme Court of Texas. If there were any history establishing a fort that could be judicially noticed, these six men would have known it.

ing a scintilla of evidence in the record) can it be said that such scintilla would cause an affirmance? We submit that there is no way for this Court to determine the effect of this unknown evidence upon the findings below. As losers below, our clients are entitled to know what evidence, what history, and what other matters were considered by the Trial Court.

The Court of Appeals states that the documents from the years of 1833 to 1844 are properly the subject of judicial notice but "what documents"? We do not know what is being considered in either Court below. The Court of Appeals further states that it relied upon the Trial Court "to separate the wheat from the chaff and thus consider only such matters as he might properly judicially notice"—Again—what wheat and what chaff? This simply denies to us our right to appeal.

We thought we had title to the land. The Government land lawyer most acquainted with the facts, Raymond H. Miller, Chief, Legal Branch, Corps of Engineers, Galveston, in February of 1948, ruled that if the Government declared any part of the lands conveyed by the 1898 deed surplus "that title to all the land covered by said deed would ipso facto reinvest in Galveston City Company, or its successors and assigns" (Def. Ex. 124). It has now been held that we did not have any interest in the land as the result of unknown matters judicially noticed and which we have had no opportunity to combat. The Webb essay which we did have an opportunity to combat has been held inadmissible, and the Morgan papers are speculative and inconclusive at the best. The other information taking our title is unknown to us. If this were a criminal case or a civil rights case, and the Trial Court

held against us based upon unknown judicially noticed evidence, any Court would give us relief.

The Court of Appeals has said, "Justice would indeed be blind if that evidence could not be introduced at a reopened hearing". Our argument here is not with respect to the Morgan papers, which were introduced on rehearing, but the subsequent independent ex parte investigation over a period of five years, the nature and extent of which we know not. This would be inappropriate in any proceeding, but is of a particularly sensitive nature when it is a proceeding by the Government against its citizens.

II.

THE 1898 DEED AND REVERTER CLAUSE ARE BINDING UPON THE GOVERNMENT.

The Court of Appeals has correctly held that the construction of the March 17, 1898 deed with the reverter clause is to be determined by local law. As shown by our statement, the benefits to the Government, as expressed by the Government's own attorneys when accepting the 1898 deed with the reverter, are as follows:

(1) To secure title (subject to the reverter) to the entire East End and remove the 15 acre limitation set by the *Jadwin* case.

(2) To strengthen the Government's claim of limitations under the five year statute against all parties.

(3) To benefit the Government in the Cochran suit.

(4) To settle and remove the claim of City Company.

(5) A source for getting the 1912 patent from the State of Texas.

The Court of Appeals has said that the benefits which the Government thought it was getting are "highly dubious". Whether dubious or not, the Government thought the benefits were of sufficient importance to accept the deed with the reverter. A party contracting for what it regards as a benefit, whether highly dubious or not, cannot unilaterally break its agreement. Consideration did exist for the deed contract. The Government received what it thought were benefits, and we do not believe that any Court should release the Government from its contract. Also, the Court of Appeals did say, "Consonant with congressional policy to avoid title litigation and the assertion of any adverse claims, whether founded or unfounded, before appropriating funds, the 1898 deed was but one of a series of instruments obtained by the Government for these purposes" (page 25). This alone is sufficient to make the reverter clause binding. *Waco Bridge Company v. City of Waco,* 85 Tex. 320, 20 S.W. 137 (1892) so holds. The Texas Supreme Court in the *Waco Bridge Company* case held: "Even if this (the deed containing the reservation—our insertion) was not a necessary link in the chain of title, if it acquired the title of those holding under it for the purpose of quieting its title or removing clouds or conflicting claims, it must be held to have taken it with and become bound by its reservations". The Court in *Waco Bridge* further held that, "We cannot attach importance to Plaintiff's mere assertion, under such circumstances, that it declined to claim under the deed".

An analysis of *Waco Bridge Company v. City of Waco* shows that a prior deed which had been accepted by one of the parties' predecessors in title provided that the grantee should open and forever keep open for the use of the public three streets of 75 feet in width each. On

a latter trial of title of the land, the grantees under the deed expressly disclaimed any interest under it. The Texas Supreme Court held that, having accepted the deed with the reservation in it, the grantee under the deed and all claiming under him, are bound by it, even though they expressly disclaimed reliance upon the deed in the subsequent litigation.

Greene v. White, 153 S.W.2d 575, 137 Tex. 561 (1941), cites *Waco Bridge* with approval. The Court of Appeals cites *Greene v. White* as holding that the deed is ineffective to convey or reserve anything if, at the time of conveyancing, the grantee had already acquired title, but, as a matter of Texas land law, this is not correct. The page of the report of *Greene v. White* cited by the Court of Appeals (page 587), refers solely to one exception of the rule, i.e., that the rule cannot apply to homesteads because by the Texas constitution there was only one way to convey a homestead.[9]

Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (Tex. Sup. 1948), *Cockrell v. Texas Gulf Sulphur Company,* 157 Tex. 10, 299 S.W.2d 672 (1957), and *Newsome v. Newsome,* 378 S.W.2d 842 (Tex. Sup. 1964),

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9. This distinction is made clear in *Adams v. Duncan,* 147 Tex. 332, 215 S.W.2d 599 (1948), wherein the Texas Supreme Court made this exception clear, saying:

> "It is true that this court said in Greene et al v. White et al., supra, that if at the time the deed in question there was executed the grantees held title by limitation, the deed from grantors (reserving the mineral estate) was wholly ineffectual. But that holding was grounded on the theory that the land was the homestead of the grantees and, as a matter of course, the instrument could not deprive them of any interest therein if they already owned it whether by limitation or otherwise, since they did not sign and acknowledge it as the law requires in any conveyance of the homestead * * *."

all hold unequivocably that the reservation is a contractual obligation. Being a contractual obligation between City Company and the Government, it cannot be breached at the will of the Government. For example, in our present case, in 1959 the Government had two choices—it could contend that the reverter clause was void or it could contend that the circumstances under which the reverter would become effective had not occurred. From the time the controversy arose in 1948 (after abandonment) up to the time of the Government's answers to interrogatories in this case, there was no indication from the Government as to which view it would take. The election of Government counsel as to whether it would or would not claim under the 1898 deed cannot be controlling. Government counsel cannot unilaterally breach a contract. The holdings in *Waco Bridge* were further affirmed in *State v. Davis,* 368 S.W.2d 658 (Houston Civ. App. 1963) and in *Williams v. Kirby Lumber Corporation,* 355 S.W.2d 761 (Beaumont Civ. App. 1962, err. refused n.r.e.). In *State v. Davis,* the Houston Court of Civil Appeals held that even though the Defendant did not claim under the document in question, having accepted it, he was bound by it. In *Williams v. Kirby Lumber Corporation,* the Court held that the deed involved there was binding "although this link in the chain of title was not a necessary link." The 1898 reverter clause is therefore binding upon the Government.

III.

IN ANY EVENT, THE GOVERNMENT'S TITLE IS LIMITED TO FIFTEEN ACRES.

The Government contends that the original 15 acre exception in the Act of 1836 and the Menard Patent has,

by accretion, extended to in excess of One Thousand Acres. The Court of Appeals has held that the question is one of Texas land law, and certainly it would be one of Texas land law as to the construction of an exception in the 1836 grant from the State to one of its own citizens —Menard.

In *State v. Jadwin,* 85 S.W. 490 (Tex. Civ. App. 1904, err. den. (Tex. Sup. Ct.)—certiorari granted and then dismissed 209 U.S. 553—1908), the precise and exact question of whether or not the fifteen-acre exception could be enlarged by accretion was presented to the Texas Courts. The Texas Court in *Jadwin* held:

> "It may also be mentioned in this connection that the United States has, since the admission of Texas into the Union, purchased a tract of land on the east end of the island, and one in the shallow waters adjacent, and in neither instance was any assertion of title made to the lands in question. The second proposition cannot be maintained on any theory. The land upon the island belonged to the state. Equally the waters of the bay and the gulf for three leagues from the shore. *As between Texas, as the grantor, and the United States, as grantee, the grant could not be enlarged by accretion.* What Texas granted to the federal government was the specific lands devoted to purposes of public defense. It seems obvious that, if these lands should be reduced to the bottom of the sea by storms and tides, the space they occupied would still belong to the government of the United States, to do with as it chose. *On the other hand, it seems equally obvious that the waters surrounding this grant remained Texas territory, and the land builded thereon by the action of the sea would be equally hers.*"

> "But aside from all this, it is enough, and decisive of this appeal, to hold that the land in question is not, and never was, a part of the site of the fort, and its appurtenances. Whether the land on which is situated the present quarantine station is on the Menard league, or on land which was formerly a part of the bottom of the sea, is immaterial. Unless it was a part of the fort site, defendants cannot complain. The state was in possession, and defendants have shown no right to it."

As a matter of binding local law, the 1836 exception at the most covered and included fifteen acres and could not be enlarged by accretion. It is admitted that City Company in 1898 owned everything not reserved by the 15-acre reservation in the Act of 1836. Consequently, in 1898 City Company (if *Jadwin* is followed) admittedly owned all of the land involved here except 15 acres. Therefore, independent of our 1898 deed, the most that the Government could have here (even assuming a fort in 1845) is a fifteen-acre tract and no more. In any event, we have title to all of the land except the 15-acre exception. We also submit that the Texas Courts held that there was no evidence in 1904 that any fortifications covered the area involved in the *Jadwin* suit, which is, admittedly, within the area in controversy here.

CONCLUSION

We respectfully submit that, insofar as the conduct of the trial, the Court of Appeals has sanctioned departure by the Trial Court from the accepted and usual course of judicial proceedings to such an extent as to call for the exercise by this Court of its power of supervision,

and, further, that the Court of Appeals has decided an important state question in conflict with applicable state laws, and that the issues here presented involve questions of law of such importance that they should be settled by this Court. For all of the foregoing reasons, it is accordingly prayed that a writ of certiorari to review the judgment of the Court below be granted.

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CERTIFICATE

I hereby certify that I have served a copy of this Petition for a Writ of Certiorari and separate Appendix B on:

The Solicitor General
Department of Justice
Washington, D. C.

Mr. Dirk D. Snel, Attorney
Appellate Section
Land and Natural Resources Division
Department of Justice
Washington, D. C.

Mr. William P. Bowers
Assistant United States Attorney
Federal Building
515 Rusk Avenue
Houston, Texas 77061

the 24 day of ~~October~~ November, 1971, by depositing the same in regular United States certified mail, first class, air mail, properly addressed and postage attached.

Preston Shirley

PRESTON SHIRLEY

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29912

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

1,078.27 ACRES OF LAND, MORE OR LESS SITUATED IN GALVESTON COUNTY, TEXAS AND GALVESTON CITY COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(July 6, 1971)

Before WISDOM, THORNBERRY and DYER, Circuit Judges

DYER, Circuit Judge: "Facts relevant to this title dispute have been developing since Jean Lafitte was appointed Governor of Galveston Island in 1819 by the

Republic of Mexico."[1] One hundred and forty years later, in 1959, the United States brought suit to remove cloud and, in the alternative, to condemn whatever interest defendant City Company[2] might have in 1,078.27 acres of land situated on the east end of Galveston Island.[3] The

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1. *United States v. 1,078.27 Acres of Land*, S.D. Tex. 1970, ____ F. Supp. ____. The almost legendary political, military and historical events which frame the issues in this case were developed in almost nineteen hundred pages of testimony and one hundred and seventy-eight exhibits. Judge Noel's two hundred and fifty-seven page opinion recites the underlying facts in detail; probes and determines many issues that either are not raised on this appeal or are not, in our view, necessary for our disposition of the case.

2. For convenience all appellants will be collectively referred to as City Company, through whom they claim. They are: First Hutchings-Sealy National Bank, Liquidating Trustee for Galveston City Company and the Stockholders; Galveston City Company; and Hill's Fish & Oyster Company, a partnership composed of Frank M. Hill, Smith M. Hill and C. R. Hill.

3. The land in question is described as follows:

NORTH PART OF
FORT SAN JACINTO, TEXAS

In Galveston County, Texas, being the entire northerly end of Galveston Island northeast of the City of Galveston;

Beginning at a point marked by a drift bolt in the center of Galveston South Jetty at engineer station 69/02.6. Said point [sic] being also located S 35° 27′ 35″ W 3,179.3 feet from the Fort Point Lighthouse (abandoned);

Thence N 82° 00′ W 625.0 feet to a point on the Easterly harbor Line of Galveston Channel, as established by the United States;

Thence northerly along said Harbor Line, including all accretions and all tidelands, westerly of the said Harbor Line and contiguous thereto, to the intersection with a line parallel with and 100.0 feet westerly from the centerline of Galveston South Jetty;

Thence northeasterly and easterly along said parallel line with centerline of South Jetty and 100.0 feet therefrom, to the low water mark of the Gulf of Mexico, including all accretions and tidelands northerly of said parallel line;

Thence southerly at right angle to the centerline of South

condemnation proceeding was severed from the trial, pending the outcome of the title issue. The District Court found that the United States already held title to the property at the time suit was brought and since no defendant had any compensable interest in the property, it was unnecessary to determine the issue of just compensation. We affirm.

On January 17, 1833, the Mexican State of Coahuila and Texas conceded to Juan N. Seguin one league of land which included the entire east end of Galveston Island. On July 30, 1834, title to one league was issued to Michael B. Menard as attorney-in-fact for Seguin. Im-

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Jetty 200.0 feet to point on the low water mark of Gulf of Mexico;

Thence southerly and southwesterly along the said low water mark of Gulf to a point which is located S 82° 00′ E from aforementioned drift bolt, including all accretions and tidelands;

Thence N 82° 00′ W along the south line of this tract to place of beginning, containing 1082.00 acres, more or less;

LESS AND EXCEPT the following parcels:

Parcel A: Beginning at the southwest corner of site from which mark "B" a brass plug set in cap rock on South Jetty bears N 80° 51′ W 27.1 feet; and running thence N 31° 04′ E, 300 feet parallel to and 25 feet distant from the centerline of said South Jetty, to the northwest corner of site; thence S 80° 51′ E 413.6 feet, to the northeast corner of site; thence S 09° 00′ W 278.3 feet, to the southeast corner of site; thence N 80° 51′ W 525.6 feet, to the point of beginning, the tract containing an area of 3 acres, more or less.

PARCEL B: Beginning at a point on the southerly line of the hereinbefore described Parcel A (course numbered 4) from which the southwest corner of same bears N 80° 51′ W 209.36 feet; and running thence S 80° 51′ E 50 feet, along the southerly line of Parcel A; thence S 09° 09′ W 635.84 feet, to point in the northerly line of the highway to Ferry; thence N 80° 51′ W 50 feet, along said northerly line; thence N 09° 09′ E 635.84 feet, to the point of beginning, this tract containing an area of 0.73 acre, more or less, leaving a balance of 1078.27 acres, more or less.

mediately thereafter Menard transferred the title to himself and nine associates.

After Texas declared its independence from Mexico, Menard, as assignee of Seguin, petitioned the Congress of the Republic of Texas to confirm his title because it was subject to doubt. On December 19, 1836, the Congress, by "An Act Relinquishing One League and labor of land on the east end of Galveston Island to Michael B. Menard and Associates," relinquished the land but reserved to itself in section 5, a tract of land containing fifteen acres more or less. The "reserved" land is the heart of this litigation.

On January 28, 1838, the Republic of Texas issued to Menard and his associates a patent for a league and labor of land which included the east end of Galveston Island, but excepted "the reservations expressed in the fifth section of the Act of Congress aforesaid." In January 1842 and June 1843, Menard deeded the land to the City Company by reference to the Seguin Grant and the Menard Patent.

A treaty of annexation was entered into between the United States and the Republic of Texas on June 23, 1845. On December 29, 1845, President Polk signed the joint resolution of Congress making Texas a state of the United States, the terms of which included a cessation to the United States of "all barracks, . . . ports and harbors, docks, magazines . . . fortifications, and all other property and means pertaining to the public defense."

The hurricanes of 1837 and 1875 resulted in substantial erosion and alteration of the low lying eastern end of Galveston Island, including the "Reserve." As a con-

sequence, the City of Galveston and the United States became concerned. They constructed a pier and jetty system which not only arrested the erosion, but caused accretion to commence.

In 1890 the land in question was surveyed by government engineers, under the supervision of Major O. H. Ernst, to relocate the south boundary of the Reserve. It was then marked with cedar posts in the ground; and thereafter a fence along the boundary was erected. In 1898, before proceeding with fortification of the strategic east end of the Island, the Government requested a quitclaim deed to the Reserve from the City Company. On March 17, 1898, the City Company deeded to the United States all land north of the Ernst line on the east end of Galveston Island upon condition

> that the said property is to be used by the United States of America for fortifications, military or naval posts, and other public purposes of the U. S. Government, only, and if at any time it be abandoned for the purposes aforesaid, or the said property is used for any private purposes whatsoever, then in such, or any or either event, the title to said property hereby conveyed shall immediately revert to and vest in the said Galveston City Company, its successors or assigns.

After years of consideration by various federal officials—including the Chief of Engineers, the Secretary of War, and the Attorney General—the deed was finally accepted and recorded on August 10, 1910.

The Government used the land as a military fort until 1947. On January 19, 1959, the land was officially transferred to "civil account" from "military account." Since

1947 the City Company has asserted title under the conditions in the 1898 deed and has demanded possession. It has also relied on the Seguin Grant and Concession. The Government, on the other hand, has asserted that it obtained title to the land from the State of Texas in 1845 by virtue of the Articles of Annexation; disputes the validity of the Seguin Grant and Concession; has denied the efficacy of the 1898 deed from the City Company to the United States; and has contended that any claim by the City Company to compensation for the land is barred by the six year jurisdictional limitation of the Tucker Act, 28 U.S.C.A. §2501.

Preliminarily we find it unnecessary to concern ourselves, as did the District Court, with the question of burden of proof. Assuming the Government had the burden, we entertain no doubt that by convincing evidence it identified and proved title to the land claimed.

Another threshold question posed by the City Company is whether the judgment is fatally infected by the trial court reopening of the case fifteen months after submission and his bringing to the attention of counsel the independent research which he conducted in the meantime. After referring to a 1924 Master's thesis, prepared by a graduate student at the University of Texas, entitled "A History of the City of Galveston to 1865," the trial judge invited counsel for both parties to submit such other evidence as they might desire. Subsequently the Government introduced six exhibits, but not the thesis. The City Company objected to the reopening of the case and the offer of any more evidence.[4]

4. In his opinion the trial judge stated: "It is manifest from even a brief statement of the background of this case that many of the issues turn on political, military, historical and natural events and

Manifestly the trial judge felt that the record was, at least in some respects, incomplete. While it is unusual for a trial judge to engage in independent research, particularly with the kinetic energy here shown, we find, for the reasons which follow, that this does not require reversal.

First, the trial judge explicitly stated that his research was utilized only when the results could appropriately be judicially noticed. He did not specify what material he found appropriate, but a close reading of the record convincingly indicates that he was concerned with and took judicial notice of legislative, political, and human events of historical antiquity, *circa* 1833 to 1845, to determine the existence *vel non* of fortifications on the land in question at that time. Documents of this era were properly the subject of judicial notice. *See Dallas County v. Commercial Union Assurance Co.*, 5 Cir. 1961, 286 F.2d 388, 396-97; Wickes, *Ancient Documents and Hearsay*, 8 Tex. L. Rev. 451 (1930).

Second, in this bench trial we are entitled to rely upon the experienced trial judge to separate the wheat from the chaff and thus consider only such matters as he might

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facts which would have been of general public knowledge at the time of their occurrence. Where the record has been found unsatisfactory as to pertinent events and facts of this kind, they have been researched. Such research was conducted at the Rosenberg Library, Galveston, Texas; the Houston Public Library; the Archives Division of the Texas State Library; files of the Galveston Daily News and Galveston Tribune; Federal Records Center; Barker Texas History Library; University of Texas Library; and the Anthropology Library of the Texas Archeological Research Center of the Department of Anthropology of the University of Texas. *When appropriate*, the results of such research have been judicially noticed."
____F. Supp. at____ (emphasis added).
The source materials consulted by the court are fully set forth in his opinion.

properly judicially notice. *See Baumel v. Travelers Insurance Co.*, 2 Cir. 1960, 279 F.2d 780, 783; *Builders Steel Co. v. CIR*, 8 Cir. 1950, 179 F.2d 377, 379; *McComb v. McCormack*, 5 Cir. 1947, 159 F.2d 219, 227. *See also Cowlitz Tribe of Indians v. City of Tacoma*, 9 Cir. 1957, 253 F.2d 625, *cert. denied*, 1958, 355 U.S. 955; *Smyth v. New Orleans Canal and Banking Co.*, 5 Cir. 1899, 93 F. 899. While it is true that the court referred to and read to counsel excerpts from the Master's thesis, which was inadmissible hearsay and not a subject of judicial notice, he clearly stated: "The basic information is contained in Morgan's papers which are a very famous collection in the Rosenberg Library and the original papers are there. . . ."[5] The court thereupon reopened the hearing and invited counsel to offer further testimony. The Government accepted the invitation and offered the Morgan papers, which were received as ancient documents.

Third, City Company's objection to the court's reopening the case for further evidence gives us little pause. In a non-jury trial the court may exercise wide discretion in permitting evidence to be offered after both parties have rested. *Arthur Murray, Inc. v. Oliver*, 8 Cir. 1966, 364 F.2d 28, 34; *see Pehrson v. C. B. Lauch Construction Co.*, 9 Cir. 1956, 237 F.2d 269, 271-72; *Chemical Delinting Co. v. Jackson*, 5 Cir. 1951, 193 F.2d 123, 127. Where, as here, the court has itself discovered relevant evidence tending to establish the truth of a 150-year-old fact, justice would indeed be blind if that evidence could not be introduced at a reopened hearing.

Finally, we have painstakingly reviewed the record and the exhibits and have found direct support for our deter-

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5. ___ F. Supp. at ___.

mination of the issues which we find necessary to consider and decide on this appeal. Thus, if there was any error in that the District Court "inappropriately" took judicial notice of some matters turned up in his research, we conclude the error was harmless. Fed. R. Civ. P. 61; *see Builders Steel Co. v. CIR, supra* at 379; *McComb v. McCormack, supra* at 227.

We turn now to the sole issue confronting us: which party, if either, had fee simple title to the land in question on November 21, 1959, the date the Government filed the original complaint. This simply stated proposition spawned a multitude of complex legal issues that faced the District Court. The court's exhaustive and comprehensive opinion makes it unnecessary to delve into many of the contentions elucidated at trial. Accordingly, we narrow our inquiry to the bases upon which the City Company and the Government rely to establish their respective claims of title, and the legal effect, if any, of the reservation contained in the 1898 deed from the City Company to the Government.

The City Company's Title

The City Company urges that the concession of January 17, 1833, and the grant of July 30, 1834, from the State of Coahuila and Texas to Seguin, which included all of the east end of Galveston Island without exception, were valid. Without so much as a nod at the Mexican national law concerning the prerequisites for obtaining a valid title at that time, the City Company rests its argument on the proposition that the grant presumptively complied with then existing law. *Smith v. Temple Lumber Co.*, Tex. Civ. App. 1959, 323 S.W.2d 172, 177.

If, and the if is a big one, we were to accept the City Company's argument that the grant is presumptively valid, the presumption disappears upon proof that the grant was void. The District Court so found, and we agree. Without belaboring the point so thoroughly developed in the District Court's opinion, it is clear that neither Seguin nor Menard obtained the necessary approval of the Supreme Executive of the United Mexican States which was required in 1832[6] for the granting of land located, as is this land, within ten littoral leagues of the seacoast. The fact that by the time title was issued to Menard, as attorney-in-fact, in July 1834, the laws governing disposal of vacant lands had been suspended is of no moment. If the *alcalde* (mayor) of the Town of Liberty, Mexico, had any authority to issue title to this property to Menard, it could only have been pursuant to the 1832 law.[7] But "grants made by the State under the earlier laws of 1825 and 1832 were void unless the prior approbation of the federal executive was obtained and proven." *State v. Balli*, 1944, 144 Tex. 195, 190 S.W.2d 71, 94, *cert. denied*, 1946, 328 U.S. 852; *Republic of Texas v. Thorn*, 1848, 3 Tex. 499, 510; *see Wilcox v. Chambers*, 1862, 26 Tex. 180, 187-188.

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6. Article 4 of the General Law of Colonization, Decree No. 72, August 18, 1824, 1 Laws of Texas 95, 97, provided: "No lands lying within 20 leagues of the boundaries of any foreign nation, nor within 10 leagues of the coast, can be occupied by settlors without the previous approbation of the Supreme Executive Power."

By Article 25 of Decree No. 190, April 28, 1832, 1 Laws of Texas 299, 303, the Congress of the State provided: "The Executive shall take care that, within . . . ten littoral leagues upon the coast of the Gulf of Mexico, no settlements are made that are not composed of two-third Mexicans, previously obtaining by request the approval of the National Executive, to whom he shall forward all petitions made on the subject. . . ."

7. *See* note 6 *supra*.

Next the City Company argues that the 1836 Act of Relinquishment, passed by the Congress of the Republic of Texas at Menard's behest, and the patent issued to him conveyed to him title to all of the east end of Galveston Island, irrespective of a reservation contained in section 5 of the Act and, by reference, likewise included in the patent. The reservation in the Act stated:

> All that tract of land from the extreme east end of the Island of Galveston running west on the north side of the Island until it strikes a bayou, a short distance above the present fort, thence up said bayou to its source, thence in a straight line across the Island to the Gulf, containing fifteen acres more or less. . . .

In 1838, acting under the authority granted by the Act, the President of the Republic of Texas signed a patent granting to Menard by quitclaim deed the Republic's title to the land relinquished, excepting "the reservations expressed in the fifth section of the Act of Congress aforesaid."

The City Company was formally organized in 1838 and incorporated in 1841. By deeds dated January 1, 1842, and June 1, 1843, respectively, Menard conveyed the land to it by reference to the Seguin grant and the Menard patent. The City Company urges that the reservation is void for indefiniteness and therefore the title to the Reserve passed to Menard. It contends that there is no way to fit the Moreland and the Borden field notes—the only known sets of field notes made prior to December 9, 1836—to the reservation, and further, that there is no way to apply the description of the reservation

to the Groesbeck survey of 1838. Finally, it is said that the reservation cannot be placed on the ground because there is no starting point that is identifiable, and that the calls cannot be identified either in distance, direction, or fact. Citing *Norris v. Hunt*, 1879, 51 Tex. 609, 614. City Company submits that:

> The true rule, as deducted from the authorities, seems to be that this description should be so definite and certain upon the face of the instrument itself, or by other writing referred to, that the land can be identified with reasonable certainty.

See also Mankey v. Adams, 5 Cir. 1927, 18 F.2d 60; *Matney v. Odom*, 1948, 147 Tex. 26, 210 S.W.2d 980; *Smith v. Griffin*, 1938, 131 Tex. 509, 116 S.W.2d 1064; *Higgins v. Bankers Mortgage Co.*, Tex. Comm. App. 1929, 13 S.W.2d 683.

We agree with the District Court that the principles relied upon by the City Company are correct as applied to deeds. *Matney v. Odom, supra* at 982. But such principles are inapplicable in determining the construction to be applied to legislative grants, which are always construed strictly in favor of the state. *Empire Gas & Fuel Co. v. State*, 1932, 121 Tex. 138, 47 S.W.2d 265, 272. In construing such grants the courts may not exclude other relevant considerations when, as here, they must grapple with the difficulty of locating land after 140 years of significant changes wrought by hurricane winds and changing tides on what was once an almost barren sand spit.

In 1836 the east end of Galveston Island that was sought to be reserved from the Menard grant was a

peninsula surrounded on three sides by water. Thus the only confusion concerning the boundary of the reservation was necessarily related to the location of the south line. The District Court put it: "If the South boundary could have been located on December 9, 1836, the date of the Act, then the reservation was described with reasonable certainty." ___ F.Supp. at ___.

The grant and the exception describing the Reserve must be "interpreted according to the intention of the Legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature." *State v. Delesdenier*, 1851, 7 Tex. 76, 107. The City Company urged an extension of this rule of construction in *City of Galveston v. Menard*, 1959, 23 Tex. 349, where Menard was contending that the grant to him to the west of the Reserve, under the 1836 Act, extended to the edge of the harbor channel in the Bay. The court accepted this argument, saying:

> By the strict letter of the legislative grant, Menard's right of property did not extend to the channel. It is extended there, only by resort to the plain intention of the contracting parties.

Id. at 404. *See also Empire Gas & Fuel Co. v. State*, *supra*. Thus where the instrument itself does not fully disclose the intention of the legislature, a court may consider extrinsic facts such as history, subject matter involved, and the end sought to be obtained. *Magnolia Petroleum Co. v. Walker*, 1935, 125 Tex. 430, 83 S.W.2d 929, *cert. denied* 296 U.S. 623.

In concluding that the description in section 5 of the Act was sufficient to ascertain the south boundary line,

the District Court properly relied in part on the fact that the Congress and Menard had the two surveys of the east end of Galveston made by I. N. Moreland in 1834 and by John P. Borden in 1835. In this connection the court in *Menard* said:

> These provisions show unquestionably, that negotiations had transpired between the government and Menard, for the building of a town upon the island of Galveston; which would be a port of entry; and that the subject was practically surveyed, and well considered by them.

23 Tex. at 397-98. Menard's counsel persuaded the court to give a practical construction to the Act by arguing that "[t]he legislative Act, in favor of Col. Menard, was to be read, not with the precision of an orthoepist, or the faultfinding astuteness of a lawyer; but according to the plain understanding, the common-sense, the common usage of everyday, practical business men." 23 Tex. at 374.

Furthermore, it is significant that John D. Groesbeck, having been employed by Menard to survey the land acquired under the Act of Relinquishment, completed his survey of the east end of the island in 1838. The hurricane of 1837 was of such severity that it substantially changed the configuration of the east end of the island and destroyed any marker that may have been placed there by Trimble and Lindsay, who in 1837 surveyed the island except for the league of labor and land sold to Menard. Accordingly, Groesbeck necessarily relocated the southern boundary between the Menard patent and the Reserve, as well as the other boundaries of both parcels. Groesbeck succeeded in his endeavor, and

thereafter his lithographical map was used for years by the public and the City Company.

Between 1838 and 1888 there were major topographical changes caused by hurricanes, tidal changes, erosion, and accretions. In the latter year, O. H. Ernst surveyed the land for the Government and relocated the boundary line between the Menard Patent and the Reserve on a course and position consistent with that located by Groesbeck. Major C. J. Allen, Major Ernst's successor, relocated the Reserve's south boundary in 1890. The line was marked with cedar posts, and in 1892 a fence was constructed. Allen's boundary was a prolongation of Groesbeck's line east and west. The Groesbeck-Ernst lines were, for all practical purposes, coincident. In these circumstances the District Court properly found that they were the best evidence available for the location of the south boundary of the Reserve. *Taylor v. Higgins Oil and Fuel Co.*, Tex. Civ. App. 1928, 2 S.W.2d 288, 300; *see e.g., East Texas Pulp & Paper Co. v. Cox*, Tex. Civ. App. 1964, 381 S.W.2d 78. From what we have said it is self-evident that, although a present day surveyor would find it difficult to locate exact points and calls on the ground, this does not impeach the definiteness of the original description. It is manifest that the southern boundary of the Reserve, as defined in section 5 of the Act of Relinquishment, could have been located in 1836 and, in fact, coincides with the line found by Groesbeck and redetermined by Ernst.

Moreover, the southern boundary was recognized by the parties as fixed by the Groesbeck-Ernst line. The City Company recognized the Groesbeck survey and map as accurate and used it in the sale of lots. It is the only line on which the United States and the City Company

have relied since 1888. It has been fenced since 1892 and has been continually possessed and improved by the Government since that time. Thus, if there ever was any doubt concerning the location of the boundary line of the Reserve it has been dissipated by the City Company's acquiescence. *See Gulf Oil Corp. v. Marathon Oil Co.*, 1941, 137 Tex. 59, 152 S.W.2d 711, 714.

For the reasons explicated at length in the District Court's opinion and those which we have briefly discussed, we find the description of the reservation contained in section 5 of the Act of Relinquishment sufficiently definite and valid.

The City Company claims further, however, that the Reserve is limited to no more than 4.9 acres or, in the alternative, fifteen acres because the submerged land on the north, east, and west passed to Menard under his patent. Thus the accretions which filled the submerged land belong to the Company as the successor to Menard.

Following the 1875 hurricane, approximately thirty-eight acres of upland remained in the reserve. Thus, practically all of the 1,078.77 acres in suit consist of accretions which occurred after the 1875 storm. The record firmly supports the Government's position that all accretions to the land in question were to the upland (a natural deposit of alluvium on the shore causing the mainland to extend outward), and not to the submerged land (deposits which, having created a high point in the sea bottom, build up and toward the older upland, becoming fast land as they meet). Accretions to the upland, as in this case, belong to the owner of the upland. *Luttes v. State*, 1958, 159 Tex. 500, 324 S.W.2d 167, 187; *Giles v. Basore*, 1955, 154 Tex. 366, 278 S.W.2d 830, 835-36.

The City Company, nevertheless, contends that it is the owner of the accretions beeause the description of the land in the Menard patent does call to proceed

> thence eastwardly with the channel of the harbor in the Bay of Galveston and with the general course of said island at the distance of at least one hundred and fifty varas from the shore to a stake one hundred and fifty varas from the extreme eastern point of said island; thence south to the Gulf of Mexico, thence with the meander of the Gulf to the southeast corner of Lot No. One (1) in said plot of survey. . . .

City Company relies upon this description and the decisions in *City of Galveston v. Menard, supra; State v. Galveston City Company,* 1873, 38 Tex. 12; *State v. Lain,* 1961, 162 Tex. 549, 349 S.W.2d 579; and *State v. Jadwin,* Tex. Civ. App. 1904, 85 S.W. 490, *error dismissed,* 209 U.S. 553.

In *Menard* accretion was not an issue. The case involved flats located south of the south boundary line of the Reserve. The decision did not purport to determine title to the submerged land surrounding the Reserve. It is noteworthy, however, that the state court in *Menard* construed the Act and patent to conform to the intent of the parties. 23 Tex. at 397, 404-05. By analogy, since it is clear that Congress excepted the Reserve for the public defense, the fortifications located on it would have been wholly ineffective without direct access to the harbor and the channel, or without title to the flats adjacent to the area. The District Court aptly said:

> It was the intention of the Congess that the south line of the Reservation should extend from the Gulf

> shore to the harbor channel; and, that the Menard patent should not include any land north or east of that line. In other words, it was the intent of the Congress that the quitclaim deed to Menard should include only the submerged land or flats adjacent to the harbor side of the land upon which the city was to be built, namely the land *granted* in the Act of Relinquishment, *but* that the Republic of Texas should retain title to the submerged land or flats adjacent to the Reserve. This is entirely consistent with the reasoning of the Supreme Court of Texas in *Menard*. The intent of the Congress, not the words of the officer who prepared the patent for signature by the President, is controlling.

____ F.Supp. at ____; *see State v. Delesdenier, supra.* This is in accord with the generally accepted rule that a grant from the sovereign conveys only that specifically and unequivocally delineated and nothing more. *Empire Gas & Fuel Co., supra* at 272.[8]

Having determined that the City Company obtained no title to the land in question under the Seguin grant and concession or under the patent from the Republic of Texas, we turn to consideration of the Government's title claim.

The Articles of Annexation

The United States Congress on March 1, 1845, adopted a joint resolution consenting to annexation of

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8. The submerged land in controversy in *Lain* was located south of the prolongation of the Groesbeck line. There was no adjudication affecting the United States, which was not a party. The issues there tried are inapposite to the case *sub judice*. The Government was a party in neither *State v. Galveston City Co.* nor *Jadwin*. In the former case the City Company disclaimed the Reserve. In *Jadwin*, on an inadequate record, it was held that Corps of Engineers officers had failed to prove that the land there involved was owned by the United States. 85 S.W. at 492.

the Republic of Texas upon certain conditions. Pertinent to our consideration was the following:

> Said state, when admitted into the union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, . . . magazines, arms, armaments, and all other property and means pertaining to the public defense, belonging to said Republic of Texas, shall retain [certain items such as all vacant and unappropriated lands lying within its limits]. . . .

5 Stat. 797.

The conditions of annexation were accepted by the Congress of Texas on June 23, 1845 (2 Gammel, Laws of Texas 1200, 1225) and its people meeting in convention on July 4, 1845. 2 Gammel, Laws of Texas 1228. On December 29, 1845, the United States Congress passed a joint resolution admitting Texas into the Union. 9 Stat. 108.

The Government contends that title to the Reserve passed to it on December 29, 1845. The City Company denies cession of the Reserve. Thus the pivotal question is to what use was the Reserve being put on the date in question.

It would serve no useful purpose to detail the evidence so fully considered by the District Court concerning use of the Reserve. Suffice it to say that there is substantial evidence to support the lower court's conclusion that on December 29, 1845,

> the fortifications at Galveston had been erected; housing, guns and ammunition had been supplied; personnel had been provided; . . . the fortifications

> were located on the Reserve near the old fort; . . . they belonged to the Republic of Texas; and, . . . they pertained to the public defense. It is also clear . . . that the entire Reserve, not merely the area immediately around the old fort, was retained by the Republic for military purposes. This dedication for military use had not been limited prior to annexation, rather, the Republic retained the entire Reserve for potential defensive use and actually constructed fortifications there from time to time. Therefore, the entire tract reserved to the Republic by the Act of Relinquishment (as well as all property thereon at the date of annexation), not merely the area immediately around the existing fortifications, passed to the United States under the Articles of Annexation.

____F. Supp. at ____.

The 1898 Deed from the City Company to the Government

On March 17, 1898, the City Company executed and delivered to the United States a quitclaim deed conveying the Reserve, *i.e.*, the land north and east of the Groesbeck line of 1838 and relocated by Ernst in 1888. The United States finally accepted the deed on August 3, 1910. The deed contained the following limitation:

> But it is expressly understood and agreed, however, that the above described property is hereby conveyed to the United States of America upon the following conditions, that is to say, that the said property is to be used by the United States of America for fortifications, military or naval posts, and other public purposes of the U.S. Government, only, and if at any time it be abandoned for the purposes aforesaid, or the said property is used for any private purposes whatsoever, then in such, or any or either event, the

> title to said property hereby conveyed shall immediately revert to and vest in the said Galveston City Company, its successors or assigns.[9]

The City Company argues that the Texas doctrine of estoppel by deed is effective because the United States, by accepting the 1898 deed on August 3, 1910, cannot assert that at that time there was title in anyone other than its grantor. The Government denies that its acceptance of the deed constituted an abandonment of its prior unconditional title, and contends that it is not estopped to dispute the City Company's title. We agree.

Local, rather than federal, law applies in a land title dispute of this nature. As we said in *United States v. Williams*, 5 Cir. 1971, ____F.2d____, [No. 29,674, April 5, 1971],

> [i]n the absence of a contravening federal statute or policy, suits by the Government to protect its proprietary interests in land are local in nature. *Mason v. United States*, 1923, 260 U.S. 545, 558; *see United States v. Standard Oil Co.*, [1947, 332 U.S. 301,] 308-09; *Camfield v. United States*, 1897, 167 U.S. 518, 524; *Cotton v. United States*, 1851, 52 U.S. (11 How.) 229, 231. (footnote omitted)

We therefore look to the Texas law to determine the validity *vel non* of the City Company's argument that in any situation, and particularly here, the reservation in the deed is contractually binding and prohibits the grantee

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9. The District Court described this as a limitation. The parties each argued that this language created a conveyance of a fee simple upon condition subsequent. It has also been referred to by the Court as a right of reentry, and by the parties as a reverter. For our purposes it is unnecessary to place it in a legal pigeonhole.

from thereafter attempting to show that at the time of the acceptance of the deed, the grantor had no title.

To ameliorate the principle relied on as an absolute, the City Company argues that the Government, by accepting the deed, should be bound by the reverter because the deed provided these benefits: it secured title, subject to the reverter, to the entire east end of Galveston Island; it removed the fifteen acre limitation of the Reserve set by the state court in *State v. Jadwin, supra;* it strengthened the Government's claim of limitation under the five-year statute against all parties; it was of some benefit in the Cochran suit; and it was of some assistance to the Government in obtaining a later patent from the State of Texas.

We are unimpressed with this enumeration of so-called benefits. In 1898 and 1910, the Government had a valid and unconditional title to the land in question; it was not a party to or bound by the *Jadwin* decision; and the other claimed benefits are highly dubious.

When the United States requested the deed to the Reserve in 1890, clearly it did not acknowledge the claim or interest of the City Company, nor did it at any time deceive the company into believing that the United States was claiming under the deed. A fair reading of the record impels the conclusion that the Government delayed its acceptance of the City Company's deed to make certain that by accepting it there would be no relinquishment of its own title or an acknowledgment of the City Company's purported title. Consonant with congressional policy to avoid title litigation and the assertion of any adverse claims, whether founded or unfounded, before appropriating funds, the 1898 deed was but one of a series of instruments obtained by the Government for these purposes.

The City Company nevertheless urges that the Government received what it bargained for and contractually bound itself by the reverter in the deed so that it cannot contend that as of the final date of acceptance, August 3, 1910, City Company did not have title to the land. It relies principally on *Waco Bridge Company v. City of Waco,* 1892, 85 Tex. 320, 20 S.W. 137; *Greene v. White,* 1941, 137 Tex. 561, 153 S.W.2d 575; and *Adams v. Duncan,* 1948, 147 Tex. 332, 215 S.W.2d 599. In the context of this case we find these authorities inapposite.

In *Waco* the plaintiff sought to enjoin the City from constructing a sewer across plaintiff's land. The City offered in evidence a deed to plaintiff's predecessor in title in which the grantor had reserved streets across the land and dedicated them to the public use. The court, finding that the plaintiff was estopped, held: "It was sufficient, for the purposes of this case, if it appeared that it [the deed reserving and dedicating the streets] was one of the sources under which the plaintiff claimed the land." *Waco Bridge Co. v. City of Waco, supra* at 140.

In *Greene* the court, in considering estoppel by deed, said:

> The general rule is that the grantee in a deed accepted by him is a party to the deed, even though he does not sign it, and that he is concluded by recitals in the deed and by reservations contained therein in favor of the grantor. Martin v. Roberts, 57 Tex. 564, 568; Orbeck v. Alfei, Tex. Civ. App. 276 S.W. 947; 21 Corpus Juris p. 1095, § 81; 19 Am. Ju., p. 627, Sec. 29, p. 624, Sec. 26.
> * * *
> . . . [T]he grantee is bound by the contract in the form of a deed because he is a party to it.

Id. at 583-84.

Much has been said and written about *Greene* but all agree that its holding is obscure. The ultimate holding in *Greene* was that the deed executed by the grantor was ineffective to transfer homestead property. However, the court did say that, while to estop the grantee from claiming land subject to a reservation in the deed the grantor need not establish that he had good title at the time of conveyancing, 153 S.W.2d at 584, the deed is ineffective to convey or reserve anything if at the time of conveyancing, the grantee had already acquired title to the land. *Id.* at 587.

The Texas rule and an explication of *Greene* was succinctly stated in *Lambe v. Glasscock,* Tex. Civ. App. 1962, 360 S.W.2d 169:

> The general rule in Texas is that recitals in a deed are binding only when the parties thereto claim under such deed. . . . The rule in Greene v. White, supra, does not apply when the parties to the deed in question never attempted to use same in their chain of title.

See also Dean v. Hidalgo Water Improvement District, Tex. Civ. App. 1959, 320 S.W.2d 29.

In *Texas Pacific Coal & Oil Co. v. Honolulu Oil Corp.,* 5 Cir. 1957, 241 F.2d 920, the defendant, as lessee of an oil lease gave a farm-out letter to Bowden providing that if he would drill a well, defendant would assign him the lease, reserving a 1/16 overriding royalty. Bowden assigned the rights of the farm-out letter to plaintiff, who thereafter drilled a dry well. After the lease expired, plaintiff asked for and received the assignment; but defendant reserved in it a 1/16 overriding royalty in any future lease

covering the same land made by the plaintiff with the landowners. Three years later plaintiff obtained a new lease from the original lessors and discovered oil. Defendant claimed his overriding royalty. In holding for plaintiff, this Court said:

> [A]s pointed out in the Adams and Klein cases, in order for the principle [*Greene v. White* — that the grantee is concluded by the recitals in the deed reserving an interest in the grantor] to apply it must appear that the parties claimed title to their present lease *under, and so claiming used, the assignment to their advantage.*

Id. at 922-23 (emphasis added) (footnote omitted). The footnotes to this case also underlie the necessity for the grantee's reliance on the instrument or deed in question.

> "*Appellee claims title to the mineral rights here involved by virtue of the provisions in the deed* dated April 26, 1922, when the land was deeded to Henry Klein subject to the reservation of all minerals on the property in question with the right to mine the same. . . .
>
> "*The instrument dated April 26, 1922, was a contractual obligation and used by the parties herein to prove their record title. They cannot be* heard to say they are not bound by its terms. Adams v. Duncan, 147 Tex. 332, 315 S.W.2d 599, 603 stated:
>
> " 'Since the Ford deed was not void, we think its effect is settled by Greene v. White, 137 Tex. 361, 153 S.W.2d 575, 136 A.L.R. 626. Although they did not sign the deed, *grantees Adams accepted it and subsequently used it to their advantage;* so they and petitioners, their privies, were concluded by its re-

citals and by the reservations therein in favor of the Duncan estate and its heirs, the respondents. . . .

* * * *

"'The grantees not only accepted the deed but they recorded it; *they used it in subsequent litigation to prove record title in themselves, and one of them testified that they bought the land by that deed in 1906 and never owned it before; and they referred to it thereafter in conveyances affecting the land. Therefore, neither they nor petitioners as their heirs and successors in title can now be heard to say that they are not bound by its contractual obligations.*'" (all emphasis supplied) Klein v. First Nat. Bank, *supra,* 266 S.W.2d at pages 448, 450 and 451.

We agree with the District Court that at no time did the United States acknowledge or claim any title under the 1898 deed from the City Company. On the contrary, both in 1910, and thereafter, the United States already held and asserted a valid, unconditional fee simple title to the land. The United States is therefore not estopped to deny the City Company's title and has clearly proved the validity of its own title.

We conclude that the record in this case amply supports the District Court's findings and that its conclusions are correct.[10]

The judgment of the District Court is

AFFIRMED.

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10. Because we decide this appeal on the issues that we have discussed, we do not reach the many other interesting questions with which the District Court dealt at length.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29912

D. C. Docket No. CA-2662

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

1,078.27 ACRES OF LAND, MORE OR LESS SITUATED IN GALVESTON COUNTY, TEXAS AND GALVESTON CITY COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before WISDOM, THORNBERRY and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

July 6, 1971

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29912

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

1,078.27 ACRES OF LAND, MORE OR LESS, SITUATED IN GALVESTON COUNTY, TEXAS AND GALVESTON CITY COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 6, 1971, 5 Cir., 1971, ___ F.2d ___).

(September 16, 1971)

Before WISDOM, THORNBERRY and DYER, Circuit Judges:

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

EXHIBIT 1

B O L I V A R R O A D S

TRACTS A & B

SOUTH JETTY R/W

GALVESTON CHANNEL

SEAWALL R/W

M L T JULY 1966

G U L F O F M E X I C O

FORT POINT & RR R/W
COAST GUARD SITE
SEAWALL R/W
SOUTH JETTY R/W
PARCEL NO 1
PARCEL NO 2
PARCEL NO 3
PARCEL NO 4
PARCEL NO 5
PARCEL NO 6
TOTAL

1" = 1000'

GALVESTON ISLAND

SURVEYED BY R.C. TRIMBLE AND W.m LINDSEY 183X

SCALE 40 CHAINS to INCH

CITY

GALVESTON BAY

GULF of MEXICO

SEC 1 SEC 2 SEC 3 SEC 4

1. 2. 3. 4.

Flag Rocks

Flag Rocks

PORT RESERVE

EXHIBIT 2

Copy of Report General Land Office, Austin, Texas.

REFERENCE

FOR THE CONTENTS OF LOTS ON THE BAY SIDE

S			S			S		
1	1	1	2	2	2	3	3	3
4	4	4						

GENERAL REFERENCE

All Lots contain 10 acres except those on the Gulf & Bay shores which have the content marked opposite them in acres, tenths and hundredths.

The Avenues are fifty feet wide and run from the Gulf to the Bay and are represented by the lines extending beyond the water mark.

The ponds containing fresh water are represented by the numbers on the map.

Eagle Grove is on Lot No. 821 in section No. 1

The 20 trees are on Lots No. 27 and 28 in Section No. 2 Grove of trees on Lots No. 108 and 176 in No. 3

The 3 trees are on Lot No. 4 in Section No. 4

In the possession of E. M. Harrison C.E.

Map

OF THE CITY OF

GALVESTON

Situated on the East end of Galveston Island

TEXAS.

1838.

Mayors Office City of Galveston
August 2nd 1854

I, J. M. Edmunds Mayor Pro tem of the City of Galveston State of Texas do hereby certify that to be a true copy of the original Map of Galveston City made by Jno. D Groesbeck, and now on file in the archives of this Office.

Seal of Corporation of Galveston City

Given under my hand and Seal of the Office the day and date above mentioned.

J. M. Edmunds
Mayor Pro tem
City of Gal.

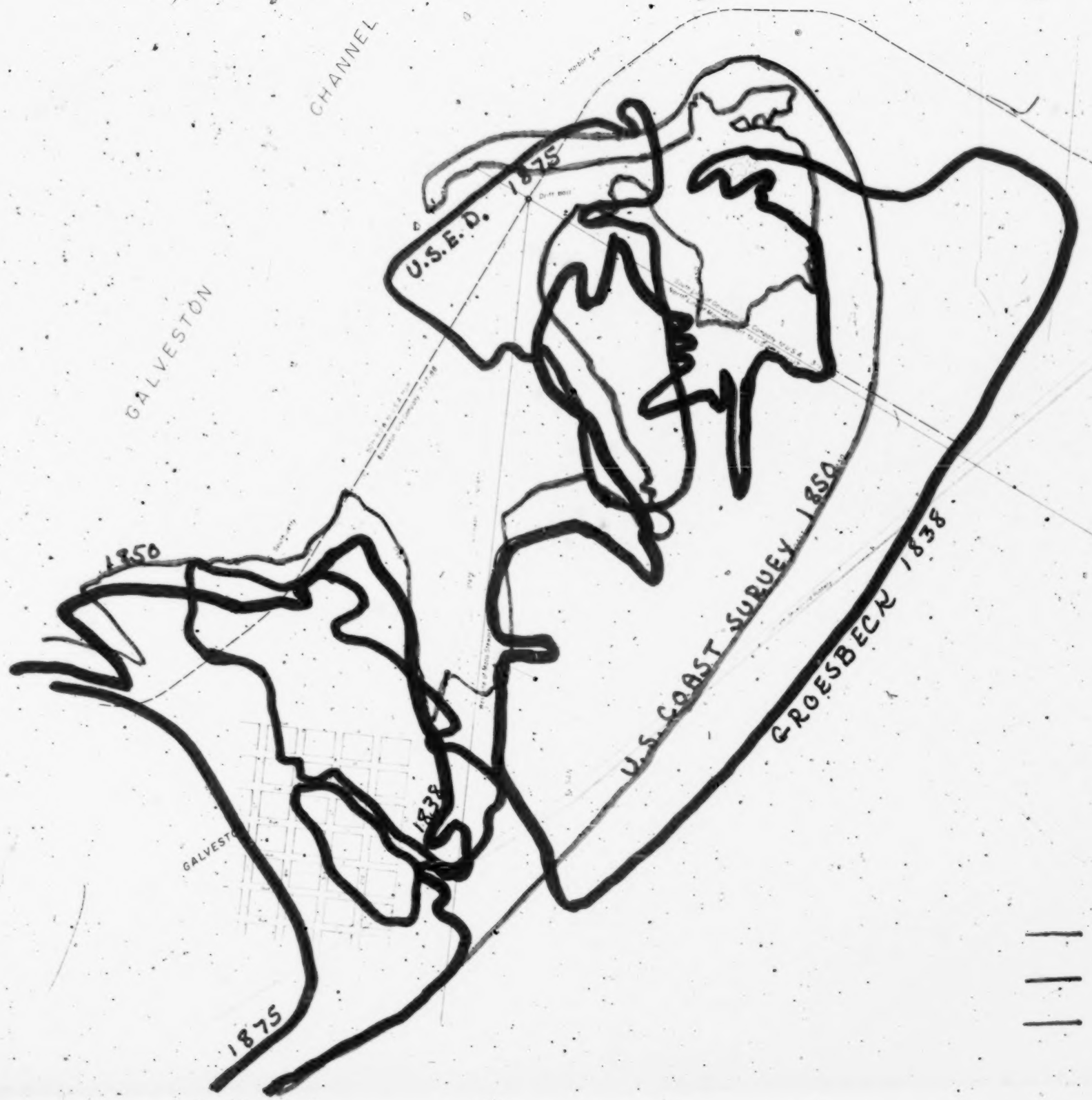
Bureau of Beach

PINE

GOVERNMENT RESERVE

EXHIBIT 3

City of Galveston of 1838 #A 2005



LEGEND

1850 - U.S. Coast Survey

1838 - Groesbeck

1875 - U.S.E.D.

EXHIBIT 4

LIBRARY
SUPREME COURT, U. S.

No. 71-705

Supreme Court, U.S.
FILED
JAN 18 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

GALVESTON CITY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

KENT FRIZZELL,
Assistant Attorney General,

GEORGE R. HYDE,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-705

GALVESTON CITY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-A 28) is reported at 446 F. 2d 1030. The opinion of the district court (Pet. App. B 1-197) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on July 6, 1971 (Pet. App. A 27-A 28). A petition for rehearing was denied on September 16, 1971 (Pet.

App. A 29). The petition for a writ of certiorari was filed on November 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conduct of the district court in engaging in independent research and taking judicial notice of certain sources required its judgment to be set aside.

2. Whether, as a matter of state law, the United States was estopped from denying the validity of a reverter clause in a certain deed.

STATEMENT

1. In 1959, the United States instituted this action in the United States District Court for the Southern District of Texas to quiet its title to 1,078.27 acres of land constituting the northern part of the Fort San Jacinto Military Reservation on Galveston Island in Texas. In the alternative, the government sought to condemn whatever interests petitioners might be found to have in such land.

The relevant history of the land in question begins in the 1830's when "one league" of the eastern end of Galveston Island was granted by a Mexican state to one Menard (Pet. App. B 2). It does not appear, however, that the grant was approved by the president of Mexico, as required by Mexican law (Pet. App. B 190-191).

After Texas became independent, Menard petitioned the new government for confirmation of his title to

the Galveston land. In 1836, the First Congress of the Republic of Texas passed an act granting to Menard the "league" of land, but reserved to Texas a tract of "fifteen acres more or less" on the eastern tip of the island (Pet. App. B 2-3). In 1838, the president of Texas issued Menard a quitclaim deed to the land described in the 1836 Act, specifically excepting the reserve (Pet. App. B 3). This "reserve", shown on an 1837 survey as the "fort reserve" (Pet. Ex. 2; see also Pet. Ex. 3), has undergone major physical changes since 1838 (see Pet. Ex. 4) and is the subject of the present litigation.

In 1842 and 1843, Menard conveyed his land to the Galveston City Company, one of the petitioners herein (Pet. App. B 3-4).

When the Republic of Texas was annexed by the United States in 1845, Texas ceded to the federal government, under the Articles of Annexation (5 Stat. 797-798):

> * * * all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *.

If, as the district court found, the "reserve" on Galveston Island was used for military purposes before and at the time of annexation, title to it passed to the United States under the Articles of Annexation (Pet. App. B 77-78, 82-83).

Having become obscured by the passage of time and the substantial erosions and accretions which affected the eastern end of Galveston Island, the southern line

of the "reserve" was relocated for the government by Major O. H. Ernst in 1889 (Pet. App. B 4-5, 47-51) and was fenced shortly thereafter (Pet. App. B 50, 136-137). Since that time, the government has been in uninterrupted possession of the land north of the Ernst line—land which now consists of more than 1000 acres.

In 1898, prior to constructing additional fortifications on Galveston Island, the government requested a quitclaim deed to the "reserve" from the Galveston City Company (Pet. App. B 5-6). The company furnished a deed, but subject to the condition (Pet. App. B 155):

> that the said property is to be used by the United States of America for fortifications, military or naval posts, and other public purposes of the U.S. Government, only, and if at any time it be abandoned for the purposes aforesaid, or the said property is used for any private purposes whatsoever, then in such, or any or either event, the title to said property hereby conveyed shall immediately revert to and vest in the said Galveston City Company, its successors or assigns.

After years of consideration by various federal officers, the deed was recorded in 1910 (Pet. App. B 6). The land was used by the government for a military fort until 1947 (Pet. App. A 5).

Finally, in 1912, following a state court decision in *State* v. *Jadwin*, 85 S.W. 490, 491 (Tex. Civ. App. 1904), writ of error dismissed, 209 U. S. 553, to the effect that the government had failed to prove that it, rather than Texas, had title to a small parcel of land

located to the north of the fence constructed along the Ernst line on which Texas had constructed a quarantine station (see Pet. App. B 83-84, 138-139), Texas issued a patent to the United States conveying its interest in all lands and accretions thereto north of the Ernst line (Pet. App. B 120-122).

2. The issue of title was tried before the district court in 1963, the court having deferred adjudication of the just compensation issue until such time as petitioners might be found to have an interest in the land in question. In May 1964, the district judge informed counsel of his desire for further evidence on the question whether Texas had maintained fortifications on the reserve from 1838 to 1845 and also announced that he was taking judicial notice of a thesis (see n. 1, *infra*) mentioning use of the reserve in 1838 for military purposes. In response to the invitation, the government introduced additional testimony and some historical papers; petitioners offered no further evidence.

Thereafter, in a lengthy opinion, the district court traced and fully analyzed the transactions dealing with the eastern end of Galveston Island and concluded that the United States presently has title to the original reserve and accretions thereto.

The court of appeals affirmed, holding that the government's title was supported by convincing evidence (Pet. App. A 6). Specifically, the court agreed with the district court (1) that the original grant in the 1830's from the Mexican state to Menard was void since the approval of the Mexican president had not been obtained (Pet. App. A 10), (2) that the reserve

in the grant from the Republic of Texas to Menard was valid (Pet. App. A 11-A 16), (3) that the reserve was used for public defense by Texas in 1845 and thus passed to the United States by the terms of the Articles of Annexation whereby Congress consented to the annexation of Texas (Pet. App. A 18-A 20), and (4) that since the government already had title to the reserve and accretions, the 1898 deed from the Galveston City Company to the United States could not act to limit that title (Pet. App. A 20-A 26).

The court also ruled that the records and exhibits in the case constituted "direct support for our determination of the issues which we find necessary to consider and decide on this appeal" and concluded that if the district court improperly took judicial notice of matters turned up in its research, the error was harmless (Pet. App. A 8-A 9).

ARGUMENT

The decision of the court of appeals is correct, is based principally on state law, and presents no conflict with decisions of this Court or any other federal court. In essence, the case involves no more than a dispute over historical facts—a dispute fully analyzed and resolved in favor of the United States by both the district court and the court of appeals. Accordingly, review by this Court is unwarranted.

1. Petitioners contend (Pet. 16-20) that the district court engaged in extensive independent research, but failed to reflect in its opinion the extent to which its findings and conclusions were based on such re-

search. The contention is without merit. The district court disclosed the source materials consulted and its basis for taking judicial notice (Pet. App. B 6-7, 12-13). As the court of appeals held, direct evidence in the record fully supports the critical findings of the district court (Pet. App. A 8-A 9). Thus, to the extent that it might have been error to take judicial notice of some materials,[1] the error was properly held to have been harmless. See 28 U.S.C. 2111.

2. Petitioners also contend (Pet. 20-23) that under Texas law acceptance of the Galveston City Company's 1898 deed to the United States bound the United States to the terms of the reverter clause in the deed. Both the district court (Pet. App. B 155-164) and the court of appeals (Pet. App. A 20-A 26), however, fully analyzed the Texas doctrine of estoppel by deed and correctly concluded that it was not applicable to the facts of this case because the United States never claimed title to the "reserve" by reason of the 1898 deed. Since, as the courts below found, the reserve was used for military purposes in 1845, it was ceded by the Republic of Texas to the United States under

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[1] The court of appeals specifically criticized the district court only for taking judicial notice of a Master's thesis of a graduate student at the University of Texas entitled "A History of the City of Galveston to 1865," but noted that the district judge had stated that the basic information in the thesis was contained in underlying documents introduced into evidence by the government (Pet. App. A 6-A 8).

the terms of annexation. Once annexation was complete, title to this and all other Texas military property was perfected in the United States without further formalities. *Benson* v. *United States*, 146 U. S. 325, 330; *S.R.A., Inc.* v. *Minnesota*, 327 U. S. 558, 563.

3. Finally, petitioners argue (Pet. 23-25) that the district court erred in not limiting the government's claim to the reserve to the 15 acres contained in the reserve at the time it was established in 1838. Primary reliance is placed upon the state appellate court's decision in *State* v. *Jadwin*, *supra*, pp. 4-5.

As the district court noted in its opinion, the *Jadwin* decision was of little help in resolving the present controversy since the court there merely held on the basis of very limited evidence that the defendant Corps of Engineers had failed to prove that the United States owned a small parcel of land near the Ernest line (see Pet. App. B 83-84, 138-139). Here, on the basis of an extensive record, the district court fully analyzed the relevant facts and concluded that the government had established that it had title to both the original reserve and all accretions thereto.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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